Supreme Court, U.S.
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No. 01-615

In The

Supreme Court of the United States

MAHARG, INC.,

Petitioner,

versus

VAN WERT SOLID WASTE MANAGEMENT DISTRICT; GARY D. ADAMS, Chairman of the Board Van Wert Solid Waste Management District; AVA K. GOOD, Director of Van Wert Solid Waste Management District; GARY D. COOPER, Director of Van Wert Solid Waste Management District,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Supreme Court review the Sixth Circuit's decision that the dormant Commerce Clause is not violated by a county regulation that allows solid waste generated within the county to be delivered to any of eight solid waste facilities that were designated by the county using an open, fair, and non-exclusive contracting process that provided all potentially interested facilities located inside or outside the state with an equal opportunity to receive the county's waste?

LIST OF PARTIES

The list of parties in the Petition is incorporated by reference herein subject to the following clarifications. Respondent Van Wert Solid Waste Management District is a solid waste management district established and maintained by the Board of Commissioners of Van Wert County, Ohio. Respondents Gary D. Adams and Ava K. Good are elected members of the Board of Commissioners of Van Wert County, Ohio. Respondent Gary D. Cooper is a former elected member of the Board of Commissioners of Van Wert County, Ohio, whose term of office expired on January 3, 2001, at which time Mr. Cooper was replaced by newly elected Commissioner Clair A. Dudgeon.

CORPORATE DISCLOSURE STATEMENT

Respondents are a public agency and its officers. There are no parent, subsidiary or affiliate companies to be listed pursuant to Rule 29.6.

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All relevant opinions are included in the Appendix to the Petition.

JURISDICTIONAL STATEMENT

Petitioner prays for exercise of this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit's decision affirming the District Court's dismissal of Maharg's action pursuant to Fed. R. Civ. P. 12(b)(6), does not conflict with the decision of another United States Court of Appeals, nor does it decide an important federal question in a way that conflicts with relevant decisions of this Court or of a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed in Petitioner's brief, the following statutory provisions are also involved herein.

Relevant Portions of Ohio Revised Code § 343.01(I)(2)

> If the board of county commissioners of a county district or board of directors of a joint district has established facility designations

> under section 343.013, 343.014, or 343.015 of the Revised Code, . . . no person, municipal corporation, township, or other political subdivision shall deliver, or cause the delivery of, any solid wastes generated within a county or joint district to any solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated under section 343.013, 343.014, or 343.015 of the Revised Code. . . . Upon the request of a person or the legislative authority of a municipal corporation or township, the board of county commissioners of a county district or board of directors of a joint district may grant a waiver authorizing the delivery of all or any portion of the solid wastes generated in a municipal corporation or township to a solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated under section 343.013, 343.014, or 343.015 of the Revised Code. . . .

STATEMENT OF THE CASE

This case involves claims by Petitioner, Maharg, Inc., an Ohio corporation engaged in the business of solid waste collection and disposal, alleging that the waste processing rules of an Ohio solid waste management district violate the dormant Commerce Clause. The pertinent facts in this case are based on the allegations and exhibits contained in the verified complaint and motion

for preliminary injunction filed by Maharg in the United States District Court for the Northern District of Ohio.[1]

Van Wert County, Ohio, is located on the western border of Ohio, approximately 30 miles away from Fort Wayne, Indiana. The county is governed by an elected Board of Commissioners (the "Board") consisting of three members, who are named as Respondents herein. Respondent Van Wert Solid Waste Management District (the "District") is a single county solid waste management district established and maintained by the Board pursuant to Ohio Rev. Code §§ 343.01 et seq. and Ohio Rev. Code § 3734.52. As provided in Ohio Rev. Code §§ 3734.52(A) and 3734.53(A), the District's purpose is to: (1) provide for the safe and sanitary management of solid waste generated within the District; and (2) prepare and implement a solid waste management plan that certifies the availability of solid waste facility capacity to meet the District's needs for at least ten years, and demonstrates compliance with the solid waste recycling, reuse, and minimization goals of the State of Ohio's solid waste management plan.

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[1] Maharg's verified complaint provided a complete record of the material facts in this case. The complaint had seventeen attached exhibits, including all of the relevant resolutions adopted by the District, the District's first and second requests for proposals, and the District's solid waste management plan. Maharg itself represented to the District Court that the complaint "set forth the relevant facts in substantial detail." Maharg's brief on appeal to the Sixth Circuit stated that, "The facts of this case are relatively undisputed." Thus, no discovery was necessary to present fully developed facts and arguments to the District Court for a decision pursuant to Fed. R. Civ. P. 12(b)(6).

Pursuant to its solid waste management plan, the District provides its residents with solid waste disposal services at the District-owned transfer station located in the City of Van Wert. The Board employs Fort Wayne-based National Serv-All, Inc. to operate the District's transfer station. The plan further requires the District to use its own vehicles and employees to provide weekly collection and processing of recyclable materials that residents place at the street curb.[2] The District also operates a large composting facility to process a substantial tonnage of yard waste into beneficial mulch and compost, thereby conserving valuable landfill space for the disposal of non-recyclable solid waste.

Maharg collects solid waste generated within the District and transports it to solid waste facilities for processing and disposal. The Jay County landfill located in Portland, Indiana, is a subsidiary of Waste Management, Inc., and is one of the facilities that Maharg prefers to use for the disposal of solid waste collected by Maharg in Van Wert County.

On August 6, 1998, the Board, acting pursuant to Ohio Rev. Code § 343.014, adopted a resolution of intent to designate sanitary landfills and transfer stations where solid waste generated within the District must be

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[2] Attached to Maharg's complaint as Exhibit A is a portion of the District's solid waste management plan, as approved by the Director of Ohio EPA on February 19, 1998. A complete copy of the District's plan is contained in the record as Exhibit 1 to Defendant's Motion to Dismiss.

delivered for disposal.[3] The resolution identified the Board's reasons for designating facilities, including: (a) assuring adequate solid waste facility capacity to handle all of the waste disposal needs of the District; (b) providing adequate funds to implement the programs contained in the District's solid waste management plan; and (c) improving the District's ability to monitor and oversee the manner in which solid waste generated within the District is collected, stored, transported, processed, recycled or disposed. (Complaint, Exhibits B, I, and M). The Board's August 6, 1998 resolution also approved a Request for Proposals (RFP) which described the District's intent to designate any landfill or transfer station that requested to receive solid waste generated within the District and agreed to execute a contract that required each designated facility to collect a fee of $5.30 per ton on the District's solid waste delivered to the facility. The Board exceeded the notice requirements in Ohio Rev. Code § 343.014 by publishing legal notices of the Board's intent to designate in newspapers in Van Wert, Ohio, and in Fort Wayne, Indiana.

The District's RFP was provided to eleven solid waste facilities, including two landfills in Indiana. Four facilities submitted a request to be designated pursuant to the RFP. The responding facilities included: National Serv-All's landfill in Fort Wayne, Indiana; Waste

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[3] A transfer station is a solid waste facility that receives waste from off-site generators and transfers the waste into larger trucks for transportation to a licensed waste disposal facility, such as a sanitary landfill. Ohio Admin. Code § 3745-27-01(C)(13).

Management's Jay County landfill in Portland, Indiana; another Waste Management landfill in Toledo, Ohio; and the District's transfer station in Van Wert, Ohio, which is operated by National Serv-All. The Board adopted a resolution on September 8, 1998, designating all four of the facilities that responded to the RFP. Pursuant to Ohio Rev. Code § 343.014(G), the Board's designations were supposed to go into effect sixty (60) days after the September 8th resolution.

One day before the Board's designations were to go into effect, the Jay County landfill notified the Board that it would not enter into the District's form designation agreement, and that it would not accept any designation by the Board even if the District modified the terms of its designation agreement or conducted a new RFP process. (Complaint, Exhibit H).[4] With the Jay County landfill refusing to be designated, the Board was concerned that proceeding with designation of the remaining three facilities would concentrate too much of the local waste disposal market in the hands of National Serv-All. Therefore, the Board decided to conduct a new RFP process to increase the number and diversity of designated facilities. (Complaint, Exhibit I).

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[4] Petitioner's brief at 16 is incorrect in its assertion that the District's designation agreement was non-negotiable. The RFP unambiguously stated that the District reserved the right to negotiate the terms of the form designation agreement with the facilities interested in being designated. (Complaint, Exhibit C, pp. 2, 8, 16, and Exhibit K, pp. 2, 8, 15).

The Board's second RFP emphasized that the Board would designate each facility that responded regardless of pricing, as long as the responding facility had the proper environmental permits as determined by their home state, and the facility agreed to execute the District's form designation agreement which required the facility to collect and remit a $5.30 per ton fee on each ton of the District's waste delivered to the facility. Eight facilities responded to the Board's second RFP, including: National Serv-All's landfill in Fort Wayne; Waste Management's landfill in Toledo; Waste Management's transfer station in Lima, Ohio; Allied Waste's landfill in Celina, Ohio; another Allied Waste landfill in Carey, Ohio; the Defiance County-owned landfill in Defiance, Ohio; the District's transfer station in Van Wert, Ohio, which is operated by National Serv-All; and a transfer station that Young's Trash Service proposed to build in Van Wert. All of the facilities that responded to the second RFP were designated by the Board on February 18, 1999. (Complaint, Exhibit O).

The District mailed a copy of the second RFP to Waste Management's Jay County landfill in Portland, Indiana, and would have designated that facility based on the same terms and conditions as the eight designated facilities if the Jay County landfill had responded to the RFP. The Jay County landfill made a business decision that it would not respond to the second RFP and, consequently, would no longer receive the District's waste.

The Board's designations of the eight facilities that responded to the second RFP went into effect on April 20, 1999. After that date, all solid waste generated within the District had to be delivered to one of the eight designated

facilities unless the Board grants a waiver allowing waste to be delivered to a non-designated facility. Ohio Rev. Code § 343.01(I)(2). Maharg cannot deliver solid waste generated within the District to the Jay County landfill because that facility decided not to be designated. Maharg has not requested the Board to grant a waiver so that Maharg may deliver the District's waste to a non-designated facility such as the Jay County landfill. (Maharg's Reply Brief of Appellant, at 4).

In dismissing Maharg's complaint pursuant to Fed. R. Civ. P. 12(b)(6), the District Court held that the District's solid waste rules neither facially nor effectively discriminate against interstate commerce. Every landfill and transfer station that was interested in receiving the District's waste had the same opportunity to be designated, regardless of whether the facility was located inside or outside of Ohio. The court similarly concluded that Maharg could not sustain its claims under the undue burden test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because although Maharg could no longer take the District's waste to the Jay County landfill, Maharg and every other waste hauler was free to take the District's waste to National Serv-All's landfill in Fort Wayne, Indiana, or any of the designated facilities in Ohio. The burden on interstate commerce, if any, from Maharg's inability to use the Jay County landfill, was the result of the Jay County landfill's refusal to be designated, rather than the District's nondiscriminatory regulation.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal of

Maharg's complaint. The Sixth Circuit held that the District's regulation neither facially nor effectively discriminates against the flow of the District's waste to out-of-state facilities. The Sixth Circuit further determined that the District's regulation is not clearly excessive in view of the District's purposes of implementing the programs in its solid waste management plan, and improving its ability to monitor solid waste management activities in the District. The Sixth Circuit concluded that Maharg's claim under the dormant Commerce Clause was at odds with the Supreme Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), because the effects on Maharg's hauling operations were the result of the Jay County landfill's decision not to be designated by the District.

REASONS FOR DENYING THE WRIT

In *West Lynn Creamery v. Healy*, 512 U.S. 186, 201-202 (1994), the Court cautioned that whatever the name, label or catchword that is ascribed to a statute challenged as violating the dormant Commerce Clause, the ultimate determination of whether the statute discriminates against interstate commerce depends upon a "sensitive, case-by-case analysis of purposes and effects." In this case, Petitioner maintains that every local rule requiring waste to be processed or disposed at one or more specified facilities is "flow control," and that all "flow control" violates the dormant Commerce Clause pursuant to the Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). As the discussion below demonstrates, however, the District's facility designations at

issue herein operate very differently from the "flow control" ordinance in *Carbone*, and a careful analysis of the practical effects of the District's regulation reveals that it is neither discriminatory nor excessive.

In addition, both Congress and this Court have recognized the traditional role of local governments in regulating solid waste collection and disposal. *See, e.g., California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); Resource Recovery Conservation and Recovery Act, § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4) (1988)) (congressional finding that the "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" supplemented by federal financial aid and technical assistance). Because the District's waste disposal regulations do not "seriously interfere" with the interstate market in waste processing and disposal, the District's regulation is permissible. *See South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187-188 (1938). Petitioner's brief fails to address the Sixth Circuit's view that Maharg's alleged injuries were peculiar to its waste hauling operations due to Maharg's preference for using the Jay County landfill, and not as the result of any discrimination or undue burden on interstate commerce by the District's regulation. The Sixth Circuit correctly held there is no dormant Commerce Clause violation in such a case pursuant to *Exxon Corp., supra*. The Sixth Circuit's decision below is in line with the prior dormant Commerce Clause decisions of this Court, as well as the decisions of other circuits that have considered regulations similar to the District's

herein. Petitioner's claims do not present a significant constitutional issue that demands the attention of this Court.

A. The Sixth Circuit's Decision Is Consistent With Prior Decisions Of This Court Regarding Local Regulation Of Solid Waste.

Since 1978, this Court has considered five cases involving local solid waste regulations that were challenged as violating the dormant Commerce Clause. *See C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994); *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). This line of cases has defined an analytical framework that is applied to determine the constitutionality of a local waste regulation: first, whether the regulation discriminates against interstate commerce; and second, whether the regulation imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits. *Carbone*, 511 U.S. at 390.

1. The Decision Below Is Consistent With The Court's Framework For Analyzing Whether There Is Discrimination Against Interstate Commerce.

The Sixth Circuit held that the District's designations did not facially, purposefully, or effectively discriminate against interstate commerce because the District used an

open, fair, and non-exclusive RFP process that provided every interested facility with the same opportunity to receive the District's waste regardless of whether the facility was located inside or outside of Ohio. Unlike the solid waste regulations in *Carbone* and *Philadelphia*, the District's designations neither restrict the processing and disposal of the District's waste to a favored facility, nor prevent the flow of waste to a facility simply because it is located in a different state than where the waste is generated.

Likewise, there are fundamental differences between the District's facility designations herein and the statute that was challenged in *Fort Gratiot*. At issue in *Fort Gratiot* was a Michigan law that created a blanket prohibition against the acceptance of out-of-state waste at a waste disposal facility in Michigan unless the acceptance of such waste was explicitly authorized by the county in which the disposal facility was located. St. Clair County, Michigan, did not authorize the receipt of out-of-state waste, and denied the petitioner's application to receive such waste at its landfill in the county. *Fort Gratiot*, 504 U.S. at 355-357. The Court determined that although Michigan's statute allowed the import of out-of-state waste in theory, St. Clair County actually prohibited such imports in fact in order to protect local waste producers from competition with out-of-state producers for local landfill space. *Id.* at 361. In contrast, the District's designation program herein was not only designed to allow waste to be delivered outside Ohio, the District's implementation of the program ensures that any out-of-state facility that wants the District's waste, such as National Serve-All's landfill in Fort Wayne, will actually receive

the waste. Accordingly, the Sixth Circuit's decision below is not in conflict with *Carbone*, *Fort Gratiot*, or *Philadelphia*, which are the cases principally relied upon by Petitioner regarding impermissible discriminatory effects.

Petitioner fails to articulate a coherent theory which explains how the District's actions are discriminatory. The Petition contends, without any support, that the District's rules favor large waste companies at the *expense of small independent haulers* such as Maharg, whereas in the Sixth Circuit, Petitioner claimed that the District's policies were motivated by a desire "to assist local haulers to the *detriment of the larger haulers* such as Maharg." *Compare* Petition at 13 *with* Petition at 11a. Maharg's contradictory positions demonstrate the evenhandedness of the District's regulations. In reality, if the District had been motivated by favoritism, its regulations would have required all of the District's waste to go to the District-owned transfer station. *Carbone* made it clear, however, that such a preference is prohibited by the dormant Commerce Clause. Accordingly, the District designed a non-discriminatory facility designation system that eschewed any preference or favoritism for any individual or class of haulers or waste facilities.

2. The Decision Below Is Consistent With The Court's Framework For Analyzing Whether There Is An Undue Burden On Interstate Commerce.

In *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12 (1997), the Court noted that most of the cases that have purported to apply the undue burden test first enunciated

in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), have "arguably turned in whole or in part on the discriminatory character of the challenged state regulations." The Court added that "a small number of our cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation." *General Motors, supra* (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945)). The Court in *General Motors* concluded that the Petitioner in that case "could not support *any claim* of undue burden" because the Ohio statute challenged therein was nondiscriminatory and did not give rise to conflicting regulations. *Id.* (emphasis added). The Sixth Circuit's decision below similarly determined that the District's rules were nondiscriminatory, and presented no risk that conflicting regulations would eliminate or severely impair the flow of waste between states if all counties designated facilities using a fair, open, and non-exclusive RFP that provides every out-of-state facility an equal opportunity to receive the counties' waste, as the District's RFP did in this case. (Petition at 10a-13a). The Sixth Circuit's conclusion that the District did not unduly burden interstate commerce is consistent with the explanation of the *Pike* analysis in *General Motors*.

In addition, the Sixth Circuit determined that the District's facility designations resulted in a minimal burden, if any, on interstate commerce. Nothing in the

District's RFP prevented any out-of-state facility from being designated, and the District did designate National Serv-All's landfill in Fort Wayne, which was the only out-of-state facility that said it wanted to receive the District's waste. Therefore, every hauler, including Maharg, is able to take as much of the District's waste as it pleases across the state line to the Fort Wayne landfill. The Sixth Circuit concluded that the District's facility designation program is in line with the District's purposes of improving its monitoring and measurement of solid waste management activities in the District, implementing the District's solid waste management plan on a self-funding basis, and maximizing the number of facilities that provide disposal services for waste generated within the District. (Petition at 18a).[5] The Sixth Circuit's conclusion is a straightforward application of the Court's undue burden analysis.

3. The Decision Below Is Consistent With The Court's Prior Holdings That In The Absence Of Congressional Legislation, A Local Government May Implement A Regulation That Is Local In Character And Effect, And Does Not Discriminate Or Excessively Burden Interstate Commerce.

Petitioner's position that the District's regulation is impermissible because of the need for "comprehensive

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[5] The facility designations were instituted to comply with the District's obligations under Ohio law to implement strategies that assure at least 10 years of adequate disposal capacity, and to recycle, reduce, and minimize the volume of solid waste generated within the District that requires landfill disposal. Ohio Rev. Code §§ 3734.52 and 3734.53 (Anderson 1999); Ohio Admin. Code § 3745-27-90 (2001).

national regulation" of waste collection and disposal, is contrary to the pronouncements of Congress and this Court. Congress views solid waste management problems as local issues that should be dealt with by local governmental agencies. *See* 42 U.S.C. § 6901(a)(4) (1988). This Court has recognized that the primary responsibility for solving waste collection and disposal problems is one that has traditionally been shouldered by local governments. *See, e.g., California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); *see also Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 653 N.E.2d 646, 653 (1995) (relying upon "long-established" precedent that cities and counties may designate waste disposal facilities as a reason why *Carbone* did not render moot a challenge against a solid waste district's designation agreement). Consequently, there is not, nor is there likely to be, a single universal approach to solving the difficulties involved in the collection, transportation, storage, transfer, processing, recycling and disposal of locally generated solid waste. *California Reduction*, 199 U.S. at 320-21. These precedents dispel Petitioner's contention that there is a compelling need for national uniformity in the regulation of solid waste collection and disposal.

The traditional reliance on local governments to deal with waste collection and disposal issues, and the diversity of the solutions that may be implemented, puts the regulation of solid waste collection and disposal squarely within the "residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to

some extent, regulate it," in the absence of conflicting legislation by Congress. *Southern Pacific*, 325 U.S. at 767; *see also South Carolina Highway Dep't*, 303 U.S. at 185. The Petitioner does not dispute that Congress has not enacted legislation that conflicts with the States' traditional police powers to provide by legislation for the safe and sanitary management of solid waste. In light of Congress' finding in 42 U.S.C. § 6901(a)(4) that states and local governments should take the lead in addressing solid waste issues, it is untenable to infer as the Petitioner does, that Congress' failure to enact national flow control legislation is intended as a prohibition against local solid waste management initiatives such as the District's facility agreements and waste fees. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) ("Nonaction by Congress is not often a useful guide"); *South Carolina Highway Dep't*, 303 U.S. at 187 (Congress' bare possession of the power to regulate interstate commerce affords no occasion for saying that the states must conform to standards which Congress could, but has not adopted). Because the collection and disposal of waste is largely a matter of local concern, and Congress encourages the states and local governments to exercise primary responsibility for addressing solid waste management issues, it is more likely that Congress simply does not perceive any necessity for enacting national flow control legislation.

Based on these precedents, Petitioner's reliance on *Healy v. The Beer Inst.*, 491 U.S. 324 (1989) is misplaced. *Healy* invalidated a pricing regulation that was not local in character or effect, and directly controlled commerce *"occurring wholly outside* of the State's boundaries." *Id.* at

336 (emphasis added). The District's regulation and fees apply exclusively to solid waste generated within the District. Moreover, the regulated waste is collected by haulers while they are in the District. It is these haulers operating within the District that pay the $5.30 per ton fee to the designated facilities, which in turn remit the collected fees to the District. Unlike the pricing statutes at issue in *Healy*, the facility designations adopted by the District are indifferent to whether the haulers and facilities that serve the District's waste needs are based inside or outside Ohio, and there is nothing in the District's regulation that requires either an in-state or out-of-state facility to change the way it operates in order to comply with the District's designations. Each facility was free to decide whether it wanted to provide disposal services for the District's waste. Every facility that wanted the District's waste was designated, and receives and disposes of the District's waste in the same way that it did before the District's designations. The only effect alleged by Maharg is that the Jay County landfill was one of the facilities that decided to discontinue receiving the District's waste. The Jay County landfill dictated this result, however, rather than the District's rules.

4. The Decision Below Follows The Court's Prior Holdings That A Company's Preferred Methods Of Operation Are Not Protected By The Dormant Commerce Clause.

The Sixth Circuit's decision is also consistent with this Court's analysis of the dormant Commerce Clause in *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978). In

Exxon, the Court determined that the dormant Commerce Clause does not "protect the particular structure or methods of operation in a given market." *Id.* at 127. Maharg's criticism of the District's regulation is that landfill owners and transfer stations were given the opportunity to decide whether they wanted to receive the District's waste for disposal or processing, and haulers such as Maharg had to live with the facilities' decisions.[6] While eight facilities, including one in Indiana, agreed to take the District's waste, the Jay County landfill that Maharg preferred to use made a business decision not to take the District's waste. Maharg's position is that the dormant Commerce Clause gives Maharg the right to impose the structure of its hauling operations on the District notwithstanding the Jay County landfill's refusal to contract with the District. *Exxon* establishes that

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[6] The Sixth Circuit answered Maharg's criticism, in part, by stating that it is not the District's fault that Maharg does not own or operate a landfill or transfer station. (Petition at 19a). In other words, it is one of the inherent risks of being an independent hauler that a landfill may decide that it does not need or want a particular independent hauler's business. Young's Trash Service, which is another independent hauler that competes with Maharg within the District, protected itself from this risk by proposing to establish a small transfer station of its own, and having the proposed transfer station designated by the District. (Complaint, Exhibit O). While Maharg could have used the same strategy as Young's, it does not need to. The District's form designation agreement requires each of the eight designated facilities to accept deliveries of the District's waste from any hauler, including Maharg. (Complaint, Exhibit K). Maharg apparently does not appreciate that the District's facility designations protects it and other independent haulers from being denied access to landfills and transfer stations that take the District's waste.

Maharg does not have that right. Moreover, Maharg has not exercised the opportunity to request a waiver from the Board pursuant to Ohio Rev. Code § 343.01(I)(2) (Anderson 1998), that would potentially allow Maharg to deliver the District's waste to non-designated facilities. The Sixth Circuit correctly decided that based on *Exxon*, Maharg's complaint fails to state a valid claim under the dormant Commerce Clause.

B. The Sixth Circuit's Decision Is Consistent With The Decisions Of The Other Circuits In Dormant Commerce Clause Challenges Against Local Solid Waste Regulations.

The other circuits that have considered a local government's use of a fair and open process to designate waste disposal providers have concluded that such designations do not offend the dormant Commerce Clause if all interested service providers have an equal opportunity to be designated. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 802 (3rd Cir. 1995). In both of these cases, the challenged regulation was intended to result in the open, fair, and competitive selection of one contractor to be the exclusive provider of waste disposal services within the designating entity's jurisdiction. The District's process in this case was designed to result in non-exclusive facility designations, and is thus far less restrictive than the designation processes in *Houlton* or *Harvey & Harvey*. The Sixth Circuit's approval of the District's designations herein maintains unanimity among the circuits that have considered the

constitutionality of open and fair facility designation processes since *Carbone*.

The other cases cited in the Petitioner's brief at 7-8, n. 3, and 19, do not involve regulations that are similar to the District's herein. These cases can be divided into three categories.

The first line of cases involves flow control ordinances requiring all of a community's waste to be delivered to a single, preferred, local facility, similar to the ordinance at issue in *Carbone*. The courts have struck down these ordinances as *per se* discriminatory. *See, e.g., Waste Mgmt. v. Metro Gov't of Nashville and Davidson County*, 130 F.3d 731, 736 (6th Cir. 1997); *Atlantic Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 112 F.3d 652, 663 (3rd Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514 (2nd Cir. 1995).

The second line of cases deals with so-called "intrastate" flow control regulations, in which waste is required to go to a single, preferred, local facility unless the waste is taken outside the state for disposal or processing. *See, e.g., On The Green Apts. L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1241-1242 (9th Cir. 2001); *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000); *United Waste Sys. of Iowa, Inc. v. Wilson*, 189 F.3d 762, 766 (8th Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1387 (8th Cir. 1997). The courts have held that these intrastate regulations do not discriminate against interstate commerce. The intrastate flow control regulations have received greater scrutiny under the *Pike* balancing test, however, and in *U&I Sanitation, supra*, at 1072, the court held that the intrastate flow

control regulation created an excessive burden on interstate commerce because it caused a substantial reduction in the volume of recyclable materials entering the market.

The third line of cases has upheld local requirements to use a particular waste disposal facility when the requirement was connected with the government's purchase or sale of waste collection and disposal services such that the government qualified as a "market participant." *See Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 56 (2nd Cir. 1998); *Red River Serv. Corp. v. City of Minot*, 146 F.3d 583, 590 (8th Cir. 1998); *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995).

These cases demonstrate that different local solid waste disposal regulations have differing practical effects on interstate commerce and, consequently, must be examined on a case-by-case basis, as this Court instructed in *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). While Petitioner lumps all of the lower court decisions together under the rubric of "flow control schemes" in order to create the appearance that the decisions are in disarray, the reality is that with respect to each of the different categories of flow control rules, the courts have followed the analytical framework of *Carbone* and reached consistent outcomes. The Sixth Circuit conducted a detailed analysis of the practical effects of the District's open, fair, and non-exclusive facility designations herein, and like the courts in *Houlton* and *Harvey & Harvey, supra*, concluded that such designations do not violate the dormant Commerce Clause.

CONCLUSION

The District's facility designations are designed to help the District address several local solid waste management issues in a manner that does not give preference to local facilities, or hoard waste or waste disposal capacity for the benefit of local interests. The District used an open, fair and non-exclusive process for granting the facility designations so that out-of-state and in-state facilities would have equal access to the District's waste, and to minimize the designations' impact, if any, on interstate commerce. Employing the same analytical framework that this Court articulated in *Carbone* and numerous other dormant Commerce Clause decisions, the Sixth Circuit correctly determined that the District's regulation is permissible. Maharg is undoubtedly upset that the Jay County landfill decided that it did not need or want the District's waste. The dormant Commerce Clause does not, however, protect Maharg's right to use a specific landfill. Nor should this Court concern itself about Maharg's protestations when Maharg itself has not applied to the Board for a waiver. Whether Maharg may deliver the District's waste to the Jay County landfill is not a significant constitutional issue that demands the attention of

Congress or this Court. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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